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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHERYL M. COLDIRON,

No. C 07-00535 CW

Plaintiff,

ORDER DENYING
PLAINTIFF'S
MOTION FOR
SUMMARY JUDGMENT
AND GRANTING
DEFENDANT'S
CROSS-MOTION FOR
SUMMARY JUDGMENT

v.

MICHAEL J. ASTRUE, Commissioner,
Social Security Administration,

Defendant.

/

Plaintiff Cheryl M. Coldiron moves for summary judgment.

Defendant Michael J. Astrue in his capacity as Commissioner of the Social Security Administration opposes the motion and cross-moves for summary judgment. Having considered all of the papers filed by the parties, the Court DENIES Plaintiff's motion for summary judgment and GRANTS Defendant's cross-motion for summary judgment.

PROCEDURAL BACKGROUND

This is the second time that Plaintiff has sought this Court's judicial review of the Commissioner's final decision denying her disability claim. On October 7, 2003, the Court issued an order remanding the case and directing the Administrative Law Judge (ALJ)

1 to reevaluate the evidence. Administrative Record (AR) 717.
2 Plaintiff disputes the ALJ's subsequent determination of non-
3 disability.

4 On June 3, 1999, Plaintiff applied for disability payments
5 under Title II of the Social Security Act (SSA), alleging
6 disability beginning on August 25, 1995. AR 109-11. The
7 application was denied initially and on reconsideration. AR 84-93.
8 On October 31, 2001, after a hearing, the ALJ, Cathryn Lazuran
9 issued a decision finding Plaintiff was not disabled. AR 22-31.
10 This became the final decision of the Commissioner when the Appeals
11 Council denied Plaintiff's request for review. AR 8-9. Plaintiff
12 appealed to this Court and on August 11, 2003 the Court issued an
13 order vacating the ALJ's decision. The parties stipulated to
14 remanding the case to Defendant for further administrative
15 proceedings. AR 717-22. In particular, the parties stipulated
16 that the ALJ would reevaluate the treating opinion of Wladislaw V.
17 Ellis, M.D.; the examining source opinions of Steven D. Feinberg,
18 M.D., and Matthew B. Zwerling, M.D.; the non-examining source
19 opinion; the lay evidence of Plaintiff's spouse, Alan Coldiron; and
20 Plaintiff's residual functional capacity (RFC). AR 717.

21 On June 22, 2005, Cathryn Lazuran, the same ALJ who had made
22 the 2001 determination of non-disability, again denied Plaintiff's
23 disability claim. AR 697-711, 926-83. The ALJ found that
24 Plaintiff did not qualify for a period of disability under 42
25 U.S.C. § 416, and was not entitled to Social Security Disability
26 Insurance Benefits (SSDIB) under 42 U.S.C. § 423, because she could
27 perform a significant number of jobs in the national economy. AR
28

1 710-11. On November 27, 2006, the Appeals Council denied
2 Plaintiff's request for further review, determining that the ALJ
3 had complied sufficiently with the Court's order. AR 678-81.
4 Thus, the ALJ's decision became Defendant's final decision.
5 Plaintiff then commenced a second civil action, pursuant to 42
6 U.S.C. § 405(g), which the Court related to Plaintiff's 2002
7 action. Pl.'s Compl. 1-2; Related Case Order 1. Plaintiff now
8 moves for summary judgment. Defendant opposes the motion and
9 cross-moves for summary judgment.

FACTUAL BACKGROUND

I. Plaintiff's Personal History

Plaintiff was born on October 6, 1955. She graduated from college and received a Master of Business Administration (MBA) degree in 1984. AR 40-43. From 1982 through 1995, Plaintiff worked as both a software sales person and software sales supervisor. AR 45-46. On January 13, 1995, at work, Plaintiff injured her right arm and shoulder when she used them to brace a falling filing cabinet. AR 702. Plaintiff has not been employed since August, 1995. AR 932. Plaintiff was originally right-handed, but after her injury she taught herself to write with her left hand. AR 932. Plaintiff has two children, who were sixteen and thirteen years old at the time of her February 12, 2001, administrative hearing. AR 42. In 2001, a Workers' Compensation judge gave Plaintiff a permanent disability rating of thirty-three and one-third percent, based on Dr. Feinberg's assessment that

1 Plaintiff's disability was permanent and stationary.¹ AR 654, 965-
2 66. Plaintiff's date last insured (DLI)--the date on or before
3 which Plaintiff was required to establish the onset of disability--
4 was December 31, 2001. AR 933.

5 II. Plaintiff's Medical History

6 Plaintiff's medical record comprises approximately 300 pages.
7 AR 889. The administrative record includes medical reports and
8 records from at least sixteen physicians, from the years 1995
9 through 2004. AR 3-7.

10 Dr. Ellis was Plaintiff's primary treating physician² from
11 April, 1996 to July, 2000. AR 392-481, 575-94. In April, 1996,
12 Dr. Ellis diagnosed Plaintiff with thoracic outlet syndrome.³ AR
13 479. From April, 1996 through May 8, 2000, Dr. Ellis treated
14 Plaintiff with brachial plexus nerve blocks,⁴ administering

16 ¹After a Workers' Compensation claimant has reached maximum
17 improvement, or his or her condition has been stable for a
reasonable period of time, the disability is deemed "permanent and
stationary." Leboeuf v. Workers' Comp. Appeals Bd., 34 Cal. 3d
18 234, 238 (1983). Then, a Workers' Compensation judge assesses a
claimant's diminished future earning capacity based on a statutory
formula. Calif. Law of Employee Injuries & Workers' Comp. § 8.01
(2007). In Plaintiff's case, the Workers' Compensation judge found
that her future earning capacity was reduced by one-third, as a
result of her permanent disability.

21 ²Prior to her injury, Plaintiff received her primary care from
Lydia Mertens, M.D., and she continues to visit Dr. Mertens for bi-
monthly check-ups and monitoring of her medications. AR 248-49.

24 ³Thoracic outlet syndrome is the general term for a group of
conditions caused by compression of nerves, blood vessels, or both,
at the base of the neck. Stedman's Medical Dictionary, 1916 (28th
25 ed. 2006) (Stedman's).

26 ⁴Brachial plexus nerve blocks involve injection of a local
anesthetic into the major nerve network serving the upper limbs of
27 the body. Stedman's at 230, 1513.

1 injections approximately every two weeks. AR 608-12. Plaintiff
2 discontinued her treatment with Dr. Ellis after the Workers'
3 Compensation judge referred her to Dr. Feinberg and asked her to
4 stop seeing Dr. Ellis. AR 962.

5 Dr. Feinberg, a certified physical medicine and rehabilitation
6 specialist, is not Plaintiff's treating physician,⁵ but she saw him
7 on at least three occasions from 2000 to 2001. AR 606-18, 665. At
8 the request of the Workers' Compensation judge, Dr. Feinberg
9 examined Plaintiff on May 8, 2000. AR 606. He diagnosed Plaintiff
10 with cervical spondylosis⁶ and chronic right shoulder pain
11 syndrome. AR 615. Dr. Feinberg examined Plaintiff again in
12 January, 2001. AR 614. During this examination, Plaintiff
13 described continued pain in her neck, right upper back, shoulder
14 and arm and she self-limited her right shoulder abduction to ninety
15 degrees. AR 614-15. Dr. Feinberg's examination revealed that
16 Plaintiff actually had full range of shoulder motion, with full
17 internal rotation and full extension. AR 615. He noted that
18 Plaintiff demonstrated diffuse discomfort to palpation and stronger
19 grip strength on the left than on the right, muscle testing was
20 otherwise normal, sensation was intact and reflexes were
21 symmetrical. Id. Dr. Feinberg ruled out psychological factors as

22
23 ⁵Dr. Feinberg did treat Plaintiff during the time that she
24 stopped seeing Dr. Ellis. But, in January, 2002, Plaintiff
25 recommenced treatment with Dr. Ellis, and in May, 2002, Plaintiff's
attorney confirmed that Dr. Ellis is Plaintiff's treating physician
for her impairments. AR 665, 857.

26 ⁶Cervical spondylosis is a neck injury, a non-specific,
27 degenerative lesion of the cervical vertebrae, intervertebral
discs, and surrounding soft tissue. Stedman's at 1813.

1 affecting Plaintiff's physical condition. Id. He determined that
2 Plaintiff was precluded from work above the right shoulder level,
3 forceful or repetitive work with her right upper arm, or any heavy
4 lifting. AR 616. He also described Plaintiff's subjective factors
5 of disability as slight to moderate pain. AR 615.

6 Dr. Feinberg referred Plaintiff to Peter Edelow, M.A., P.T.,
7 a physical therapist and thoracic outlet specialist. AR 613. Mr.
8 Edelow treated Plaintiff from July 10, 2000 through February 9,
9 2001. AR 595, 619-28, 963. On July 10, 2000, he noted, Plaintiff
10 reported that her migraines had stopped and for the previous two
11 years she had been fairly stable with the use of medication. AR
12 624. Plaintiff's regularly treating physical therapist is Edward
13 Rosen, P.T. AR 605. Beginning October 4, 1995, Mr. Rosen began
14 treating Plaintiff on a weekly basis. AR 482-556, 836. Plaintiff
15 continued physical therapy with Mr. Rosen during the time she was
16 treated by Mr. Edelow. AR 600. Mr. Rosen continued treating
17 Plaintiff until at least January 22, 2003, when he concluded that
18 Plaintiff was "totally disabled." AR 835.

19 Plaintiff underwent a psychological examination as part of her
20 Workers' Compensation claim. AR 936-37. Dr. Feinberg referred
21 Plaintiff to a psychiatrist, Dr. Charles Casella, who examined her
22 on September 19, 2000. AR 614. According to Dr. Feinberg's notes,
23 Dr. Casella found no "gross psychopathology." Id. The ALJ
24 requested Dr. Casella's full report,⁷ but did not receive it from

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26 ⁷The record does not clearly link Dr. Casella's report to the
27 psychological examination that the ALJ requested during the
hearing. Plaintiff could not remember the date of the examination
or the name of the psychologist. AR 936. However, the ALJ

1 Plaintiff or her attorney. AR 703, 936-37. In a letter dated
2 December 27, 2004, Plaintiff's attorney wrote that he had "no
3 success" obtaining the report from Plaintiff's psychological
4 examination, but he believed that Plaintiff qualified as disabled
5 based on Dr. Feinberg's "comprehensive report." AR 905.

6 On June 17, 2003, Plaintiff began treatment with a marriage
7 and family therapist, Patricia Britton, M.A., M.F.A. AR 935. Ms.
8 Britton reported that Plaintiff had "reactive depression," but did
9 not note any functional limitations resulting from mental
10 impairment. AR 903-930. Ms. Britton's counseling notes indicated
11 that therapy improved Plaintiff's symptoms of pain and depression.
12 Id. These notes also indicated that Plaintiff began taking courses
13 toward a teaching credential in late 2004 and expressed a desire to
14 return to the "world of work." AR 919-20.

15 On January 5, 1998, Bruce T. Adornato, M.D., a neurologist,
16 examined Plaintiff at the request of the Workers' Compensation
17 judge. AR 610. Dr. Adornato disagreed with the diagnosis of
18 thoracic outlet syndrome and found no "objective findings to
19 support [Plaintiff's] subjective complaints." AR 314. Dr.
20 Adornato also viewed surveillance videotapes of Plaintiff,⁸ taken

21 referenced only one existing psychological examination conducted in
22 relation to Plaintiff's Workers' Compensation claim. AR 703.

23 ⁸In 1999, Dr. Adornato reviewed three surveillance videotapes
24 of Plaintiff, dated October 25, 1997, November 12, 1998 and
25 November 19, 1998. AR 314. Because he did this at the request of
the Division of Workers' Compensation, this footage was presumably
gathered by that agency in connection with Plaintiff's Workers'
Compensation claim. In 2000, Dr. Feinberg viewed the November,
1998 videotapes and concluded that they did "not indicate much
other than that [Plaintiff] was able to be out and about during the
day," and did not show her doing much with her right arm. AR 612.

1 from October, 1997 through November, 1998, and noted that they "did
2 not demonstrate any limitation of her spontaneous movement" and
3 instead showed that Plaintiff had normal use of her right arm in a
4 variety of conditions. AR 314-17. He concluded that the tapes
5 confirmed his clinical impression that it was "medically unlikely"
6 that Plaintiff suffered from "a disability, as she describes." AR
7 315. Dr. Adornato also commented that Dr. Ellis's treatment method
8 of injecting brachial plexus nerve blocks into Plaintiff's shoulder
9 on a regular basis was "well outside the mainstream of medical
10 care." AR 319. Dr. Adornato questioned Dr. Ellis's "placebo
11 therapy" of relying on Plaintiff's subjective statements about her
12 symptoms, without objective clinical evidence for his diagnosis of
13 thoracic outlet syndrome. AR 320.

14 On July 1, 1998, Eugene W. Wolf, M.D., an orthopedist,
15 examined Plaintiff at the request of the Division of Workers'
16 Compensation and Plaintiff's employer. AR 610. Dr. Wolf found no
17 objective evidence of Plaintiff's disability, but rather an
18 "exaggeration" and "amplification" of her subjective symptoms. AR
19 285-311. He opined that Plaintiff's disability was created by Dr.
20 Ellis's treatment methods. AR 310. Dr. Wolf's report was
21 discounted in Plaintiff's 2001 Workers' Compensation disability
22 assessment. AR 610.

23 Dr. Zwerling, an orthopedic surgeon, examined Plaintiff on
24 several occasions and submitted medical records from December, 1995
25 through January, 1999. AR 365-80. On July 15, 1999, Dr. Zwerling
26 wrote a summary report, stating that he believed Plaintiff was
27 correctly diagnosed with thoracic outlet syndrome, and opining that

1 Plaintiff could work an eight hour day if allowed to alter her
2 positions frequently, though she would be precluded from lifting
3 more than ten pounds. AR 366. On February 4, 1999, Dr. Zwerling
4 posited a strong "psychologic, psychosomatic component" to
5 Plaintiff's symptoms that could be remedied with long-term
6 counseling, but he did not diagnose a mental impairment. AR 367-
7 68. Dr. Zwerling reviewed Plaintiff's medical files and disputed
8 the medical practices of her treating physician, Dr. Ellis, stating
9 that he disagreed with the value of Dr. Ellis's treatment protocol
10 of frequently injecting Plaintiff with nerve-blocking drugs. Id.

11 On October 25, 1996, David Bradshaw, M.D., a rehabilitation
12 specialist, examined Plaintiff in regard to a third party matter.⁹
13 AR 608. Dr. Bradshaw reported that he had examined Plaintiff prior
14 to her shoulder injury in January, 1995, for pre-existing
15 musculoskeletal problems and headaches. AR 229. In his October
16 25, 1996 report, he indicated that Plaintiff's lack of improvement
17 for symptoms that he determined could be remedied with "minimum
18 treatment" suggested psychiatric variables. AR 229-33. Dr.
19 Bradshaw did not diagnose a mental impairment. Id.

20 On March 30, 2004, Thanh Q. Tran, M.D., conducted a physical
21 examination and neurological evaluation of Plaintiff, at the
22 request of the SSA. AR 889-95. Dr. Tran found that Plaintiff had
23 normal ranges of motion except for an inability to raise her right
24 arm above her head. AR 890. Plaintiff had full motor strength in

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26 ⁹Plaintiff was involved in a lawsuit against the company that
manufactured the filing cabinet that had caused her alleged injury.
27 AR 286, 295. Although it is not explicit in the record, Plaintiff
apparently initiated the lawsuit. AR 668.

1 all extremities except in her right grip, no atrophy and normal
2 muscle tone. Id. Plaintiff also did "not appear depressed," was
3 "alert and oriented," with "good comprehension and attention," and
4 a "good memory." Id. Dr. Tran diagnosed Plaintiff with right neck
5 and shoulder pain and weakness in the right hand "with unclear
6 etiology." AR 891. He stated that, based on Plaintiff's
7 subjective complaints, she would be unable to work because of
8 constant right shoulder pain. Id. However, Dr. Tran's objective
9 findings were that Plaintiff had no limitations in walking,
10 sitting, standing or posture. Id.

11 III. Plaintiff's Second Hearing Before the ALJ

12 Prior to her second hearing, Plaintiff amended her disability
13 onset date to January 8, 2001,¹⁰ alleging continuing disability due
14 to degenerative disc disease and nerve damage to her right side.
15 AR 701, 783-89.

16 On October 26, 2004, Plaintiff, accompanied by her attorney,
17 Patrick Kelly, appeared before the ALJ at a second hearing and
18 presented testimony about her daily activities. AR 969-77.
19 Plaintiff stated that she was able to dress and groom herself, but
20 she had retained a housekeeper to do household chores for the past
21 several years and her husband helped her cook dinner. AR 972-73.
22 She shopped for groceries once a week but did not usually carry
23 bags from the store into the house, and she did some laundry. AR
24 973-76. Each day, she walked for about an hour and did physical

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26 ¹⁰Because Case Number 02-04903 CW was consolidated with Case
Number 07-00535 CW, the Court reviews the record from the original
claimed onset date of August 25, 1995, through the DLI, December
27 31, 2001.

1 therapy exercises for approximately an hour. AR 974. She took
2 OxyContin, a prescription pain medication, that she claimed made
3 her "fuzzy headed." Id. She also took Prozac, Elavil,¹¹ and
4 Neurontin.¹² AR 965. Plaintiff could drive a maximum of twenty
5 minutes; when she needed to go further for a doctor's appointment,
6 her husband took the day off from work to drive her. AR 975. She
7 and her family flew to Mexico for a one week vacation every summer.
8 Id. She used a computer for e-mail ten to fifteen minutes per day,
9 paid bills online, and read for a hobby for about one to two hours
10 per day. AR 975-76.

11 Plaintiff's spouse, Alan B. Coldiron, was not at the hearing,
12 but on June 18, 1999, he submitted an assessment of Plaintiff's
13 daily activities and in July, 2002, he submitted an observational
14 statement. AR 144-49, 667-71. Mr. Coldiron opined that
15 Plaintiff's daily activities were affected by her impairments: she
16 took at least four pain medications daily, and would need to take
17 these medications for the rest of her life. AR 667-71. He
18 reported that Plaintiff read, went to movies, took daily walks, ran
19 errands, and took care of their children before school. AR 144,
20 147. Plaintiff was "moody" two to three days a week, but managed
21 her mood with medication. AR 147. Mr. Coldiron indicated that Dr.
22 Wolff only examined Plaintiff for twelve minutes and his report was
23

24 ¹¹Prozac, also referred to as fluoxetine hydrochloride, and
25 Elavil, also referred to as amitriptyline, are prescription anti-
depressants. Physician's Desk Reference 1801 (61st ed. 2007).

26 ¹²Neurontin, also referred to as gabapentin, and OxyContin,
27 also referred to as oxycodone hydrochloride, are prescription
analgesics, or pain medications. Id. at 2487, 2703.

1 thrown out by a Workers' Compensation judge as biased. AR 667.
2 Mr. Coldiron also indicated that only one of the Workers'
3 Compensation surveillance videotapes of Plaintiff that were
4 interpreted by Dr. Adornato was admitted into evidence at the
5 Workers' Compensation hearing, and some of the women depicted in
6 that tape were not Plaintiff. AR 668.

7 Stephen P. Davis testified as an impartial vocational expert
8 (VE). AR 977-82. The ALJ's first hypothetical question to the VE
9 asked:

10 assume a person [of Plaintiff's age, education and past
11 relevant experience] can lift twenty pounds occasionally
12 and less than ten pounds frequently. Can stand, walk and
13 sit without limit. Can occasionally climb, stoop and
14 reach with the right dominant arm. And has no limitation
regarding use of the left arm. Is limited regarding
pushing and pulling to twenty pounds occasionally and
should not crawl. . . . Would there be . . . jobs the
person could do?

15 AR 979-80. Mr. Davis testified that this hypothetical person could
16 not perform the "light duty" requirements of Plaintiff's former
17 job, but could do some "sedentary" work. AR 979-80. The VE listed
18 three jobs this hypothetical person could perform: credit
19 authorizer, with 186,000 jobs existing nationally and 5,400 in
20 California; collections clerk, with 247,200 jobs nationally and
21 19,000 in California; and telemarketer, with 989,700 jobs
22 nationally and 16,600 in California. AR 980. The second
23 hypothetical included further limitations, such that the person
24 would only be able to lift ten pounds occasionally and would need
25 the option to sit or stand. AR 980. The VE responded that this
26 hypothetical person would also be able to do the three jobs that he
27 had previously identified. Id.

1 Board-certified neurologist and clinical neurophysiologist
2 Roger Bertoldi, M.D., testified as an impartial medical expert at
3 the 2004 hearing. AR 933-61. Dr. Bertoldi testified that the
4 medical evidence indicated that Plaintiff had degenerative disc
5 disease of the cervical spine, right arm strain and headaches, but
6 that Plaintiff's impairments did not meet or equal the criteria of
7 any listed impairment. AR 938, 946. Dr. Bertoldi testified that
8 there were no conflicts in the medical record, except for the
9 opinions of Dr. Ellis. AR 937. Dr. Bertoldi saw a conflict
10 between Dr. Ellis's treatment methods and standard procedures used
11 in the medical community. Id. Dr. Bertoldi stated that Dr.
12 Ellis's frequent injections of nerve blocks into Plaintiff's
13 shoulder was not a conventional treatment and that his credentials
14 were suspect, given his treatment methods. AR 949-50. Dr.
15 Bertoldi explained that Dr. Ellis represented himself as a
16 neuropsychiatrist, but that psychiatrists do not administer nerve
17 blocks. Id. Dr. Bertoldi was reluctant to characterize
18 Plaintiff's chronic pain as malingering, instead opining that it
19 might be attention seeking behavior. AR 952.

20 IV. The ALJ's Disability Determination

21 In her 2005 decision, the ALJ conducted the five-step
22 evaluation process¹³ outlined in 20 C.F.R. § 404.1520, and found

23
24 ¹³In order to make a SSDIB determination under Title II, the
25 ALJ must apply a sequential five-step evaluation process to the
26 disability claim pursuant to 20 C.F.R. § 404.1520: (1) is the
27 claimant engaged in substantial gainful work activity; (2) if not,
does the claimant have a severe impairment, or combination of
impairments; (3) if so, are the impairments listed in, or as severe
as those listed in Appendix 1; (4) if not, do the impairments
preclude the claimant from performing past relevant work; and

1 that Plaintiff was not disabled within the meaning of the SSA on or
2 prior to her DLI on December 31, 2001. AR 701. At step one of the
3 five-part analysis, the ALJ found that Plaintiff had not worked
4 since the alleged disability onset date. AR 710.

5 At step two, the ALJ found that Plaintiff's degenerative disc
6 disease of the cervical spine, right arm strain, and headaches were
7 severe within the meaning of the Regulations. Id. As a component
8 of the step two analysis, the ALJ examined the record and found no
9 medically verifiable evidence that Plaintiff suffered from a severe
10 mental impairment on or prior to December, 2001. AR 703. The ALJ
11 analyzed the treatment notes from Ms. Britton, Plaintiff's
12 therapist from 2003 to 2004, and found no reference to mental
13 impairment prior to December, 2001. Id. The ALJ also noted that
14 Dr. Zwerling posited a strong "psychologic, psychosomatic
15 component" to Plaintiff's symptoms, but that he did not clinically
16 diagnose a mental impairment. Id. The ALJ discussed Dr.
17 Bradshaw's suggestion of psychiatric variables contributing to
18 Plaintiff's impairment, but found that Dr. Bradshaw's suggestion
19 was not a clinical diagnosis. Id.

20 At step three, the ALJ found that Plaintiff's impairments,
21 either singly or in combination, were not severe enough to meet or
22 medically equal any of the impairments listed in Appendix 1 of the
23 Regulations. AR 710. In order to make this determination, the ALJ
24 relied on the testimony of the impartial medical expert, Dr.
25 Bertoldi. AR 703.

26 _____
27 (5) if so, is other work precluded? 20 C.F.R. § 404.1520(b)-(g).
28

1 Prior to steps four and five of the analysis, the ALJ weighed
2 the medical and other evidence in the record to assess Plaintiff's
3 residual functional capacity (RFC). AR 704. The ALJ looked at
4 several sources to make the RFC determination, including: the
5 medical information from Dr. Ellis, Plaintiff's regular treating
6 physician; the reports of Drs. Feinberg and Tran; and observational
7 statements from Plaintiff's spouse, Mr. Coldiron. Id. The ALJ
8 also looked at Plaintiff's testimony, explaining that she gave
9 little weight to these statements, because she found Plaintiff's
10 testimony "not entirely credible" in light of the treatment record
11 and Plaintiff's daily activities. AR 704. The ALJ also indicated
12 evidence in the record that detracted from Plaintiff's credibility,
13 including statements from examining physicians, Dr. Adornato and
14 Dr. Wolf. AR 705. The ALJ determined that Plaintiff retained the
15 RFC to lift ten pounds occasionally; stand and walk two hours out
16 of an eight hour day; sit for six hours out of an eight hour day;
17 and occasionally climb, stoop and reach with her right arm. AR
18 704-708. The ALJ found that Plaintiff had no limitations with the
19 left arm. Id.

20 At step four of the disability analysis, the ALJ determined
21 that Plaintiff was precluded from working in her past relevant
22 occupation of software sales person. AR 710. The ALJ based this
23 finding on the RFC assessment and the testimony of the VE, Mr.
24 Davis. AR 708.

25 At step five, the ALJ concluded that Plaintiff was capable of
26 performing sedentary work existing in significant numbers within
27 the national economy. AR 710-711. Here, the ALJ utilized the

1 Medical-Vocational guidelines, as well as the VE's testimony, to
2 determine that there were thousands of jobs in the national economy
3 that Plaintiff could perform. AR 709. Consequently, the ALJ
4 issued an unfavorable decision, finding that Plaintiff was not
5 disabled within the meaning of the SSA. AR 710-711.

LEGAL STANDARD

7 A court cannot set aside a denial of benefits unless the ALJ's
8 findings are based upon legal error or are not supported by
9 substantial evidence in the record as a whole. 42 U.S.C. § 405(g);
10 Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997).
11 Substantial evidence is "such relevant evidence as a reasonable
12 mind might accept as adequate to support a conclusion." Orteza v.
13 Shalala, 50 F.3d 748, 749 (9th Cir. 1995). It is more than a
14 scintilla but less than a preponderance. Sorenson v. Weinberger,
15 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).

To determine whether an ALJ's decision is supported by substantial evidence, a court reviews the record as a whole, not just the evidence supporting the decision of the ALJ. Walker v. Matthews, 546 F.2d 814, 818 (9th Cir. 1976). A court may not affirm the Commissioner's decision simply by isolating a specific quantum of supporting evidence. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Rather, a court must weigh the evidence that supports the Commissioner's conclusions and that which does not. Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

25 If there is substantial evidence to support the decision of
26 the ALJ, it is well-settled that the decision must be affirmed even
27 when there is evidence on the other side. Hall v. Sec'y of Health,

1 Educ., & Welfare, 602 F.2d 1372, 1374 (9th Cir. 1979). The ALJ's
2 decision should also be affirmed when the evidence is susceptible
3 to more than one rational interpretation. Gallant v. Heckler, 753
4 F.2d 1450, 1453 (9th Cir. 1984). If supported by substantial
5 evidence, the findings of the Commissioner as to any fact shall be
6 conclusive. 42 U.S.C. § 405(g); Vidal v. Harris, 637 F.2d 710,
7 712 (9th Cir. 1981).

8 Under the SSDIB section of SSA, disability is defined as an
9 inability to engage in any substantial gainful activity
10 by reason of any medically determinable physical or
11 mental impairment which can be expected to result in
12 death or which has lasted or can be expected to last for
13 a continuous period of not less than twelve months.

14 42 U.S.C. § 423(d)(1)(A). An individual will be determined to be
15 disabled only if his or her physical or mental impairment is so
16 severe that he or she "is not only unable to do his [or her]
17 previous work but cannot . . . engage in any other kind of
18 substantial gainful work." 42 U.S.C. § 423(d)(2)(A).

DISCUSSION

19 Plaintiff argues that: (1) the ALJ erred in her step two
20 finding that Plaintiff's alleged mental impairment was not severe;
21 (2) the ALJ did not comply with this Court's remand order in making
22 the 2005 determination; (3) the ALJ erred in her step five finding
23 that Plaintiff retained the RFC to perform other work; and (4) the
24 ALJ improperly discounted Plaintiff's allegation that she
25 experienced side-effects from prescription medication and
26 misconstrued Plaintiff's self-reported daily activities.

I. The ALJ Did Not Err in the Step Two Determination

27 Plaintiff argues that at the second step of the five-step

1 sequential inquiry, substantial evidence did not support the ALJ's
2 conclusion that Plaintiff did not have a severe mental impairment.

3 At step two of the disability determination, the ALJ
4 determines whether the claimant has a medically severe impairment
5 or combination of impairments that "significantly limits [his or
6 her] physical or mental ability to do basic work activities." 20
7 C.F.R. § 404.1520(c). Basic work activities include:
8 "[u]nderstanding, carrying out, and remembering simple
9 instructions," and "[r]esponding appropriately to supervision,
10 co-workers and usual work situations." 20 C.F.R. § 404.1521(b).

11 A person claiming disability bears the initial burden of
12 establishing his or her disability. Sanchez v. Sec'y of Health &
13 Human Servs., 812 F.2d 509, 511 (9th Cir. 1987). One claiming
14 disability must furnish medical and other evidence of its
15 existence. 42 U.S.C. § 423(d)(5)(A). Subjective statements about
16 pain or disability must be backed up by "[o]bjective medical
17 evidence of pain or other symptoms established by medically
18 acceptable clinical or laboratory techniques." 42 U.S.C.
19 § 423(d)(5)(A). Further, symptoms alone "are not enough to
20 establish that there is a physical or mental impairment."
21 20 C.F.R. § 404.1528. The impairment "must be shown by medically
22 acceptable clinical diagnostic techniques." Id. Moreover,
23 "[i]mpairments that can be controlled effectively with medication
24 are not disabling for the purpose of determining eligibility" for
25 disability benefits. Warre v. Comm'r of Soc. Sec. Admin., 439 F.3d
26 1001, 1006 (9th Cir. 2006).

1 Here, the ALJ ruled in Plaintiff's favor at step two, finding
2 that her combination of impairments was "severe." AR 703. The ALJ
3 was only required to consider impairments alleged by Plaintiff or
4 about which evidence had been received. See 20 C.F.R. § 404.1528.
5 The ALJ looked at the medical evidence in the administrative
6 record, finding that Plaintiff suffered from severe impairments
7 from degenerative disc disease of the cervical spine, right arm
8 strain, and headaches. Id. It remained Plaintiff's responsibility
9 to establish that she also had a severe mental impairment during
10 the time period for which she claimed disability. See Tidwell v.
11 Apfel, 161 F.3d 599, 601 (9th Cir. 1998) ("At all times, the burden
12 is on the claimant to establish her entitlement to disability
13 insurance benefits."). However, Plaintiff failed to provide
14 evidence of medically determinable functional limitations caused by
15 a mental impairment.

16 The ALJ properly examined the evidence that would support
17 Plaintiff's claim of depression and inability to concentrate,
18 stemming from severe mental impairment, and found that Plaintiff's
19 claim was not supported by objective medical evidence. The ALJ
20 examined Plaintiff's medical records and noted that Dr. Feinberg,
21 in his January, 2001 medical report, specifically ruled out
22 psychological factors as affecting Plaintiff's physical condition.
23 AR 703. The ALJ also referred to Dr. Feinberg's notation, in
24 September, 2000, that an examining psychiatrist, Dr. Casella,
25 diagnosed Plaintiff with "no gross psychopathology." AR 703. The
26 ALJ explained that, although Dr. Zwerling opined in a 1999 report
27 that Plaintiff's symptoms had a psychosomatic component, the
28

1 physician had not offered this statement as a clinical diagnosis,
2 but merely a personal opinion. AR 368, 703. Lastly, the ALJ
3 looked at a 1996 medical report from Dr. Bradshaw, who neither
4 diagnosed nor purported to diagnose a mental impairment, but
5 instead opined that Plaintiff's symptoms were indicative of
6 psychiatric variables. AR 233, 703. The ALJ properly determined
7 that none of these statements rose to the level of a medically
8 acceptable clinical diagnosis of mental impairment.

9 The ALJ also looked for evidence that Plaintiff suffered from
10 functional limitations caused by mental impairment, and found none.
11 The ALJ referred to Dr. Tran's finding that Plaintiff had good
12 comprehension, attention and memory. AR 707. She also referred to
13 Ms. Britton's counseling notes, which indicated that Plaintiff's
14 condition was improving with the use of medication, and that
15 Plaintiff did not report any problems with concentration or
16 persistence. AR 706. The ALJ also noted that Ms. Britton's
17 report, created in 2004, was based on a treatment period that began
18 in 2003, nearly two years after Plaintiff's DLI. AR 903-25.

19 For the foregoing reasons, the ALJ properly found that
20 Plaintiff's self-reported mental impairment was not supported by
21 objective medical evidence in the record.

22 II. The ALJ Complied with the Court's Remand Order

23 Plaintiff asserts that the ALJ's determination was
24 procedurally improper because the ALJ failed to comply with this
25 Court's remand order by not procuring, at step two of the
26 disability determination, a consultive evaluation of Plaintiff's
27 mental status to determine its severity.

1 Because disability hearings are not adversarial in nature, the
2 ALJ has a special duty in social security cases fully and fairly to
3 develop the record in order to make an informed decision on a
4 claimant's entitlement to disability benefits. DeLorme v.
5 Sullivan, 924 F.2d 841, 849 (9th Cir. 1991). An ALJ may order a
6 consultive evaluation where the record is ambiguous or devoid of
7 evidence. 20 C.F.R. § 404.1519a. The ALJ's duty to develop the
8 record is of less importance when a claimant is represented by an
9 attorney. Ludwig v. Halter, 5 Fed. Appx. 689, 691 (9th Cir. 2001).
10 The ALJ can fulfill his or her obligation by making a reasonable
11 attempt to obtain medical evidence from the claimant's treating
12 sources. 42 U.S.C. § 423(d)(5)(B). But the ALJ has "broad
13 latitude" in determining whether to order a consultive evaluation.
14 Reed v. Massanari, 270 F.3d 838, 842 (9th Cir. 2001). The ALJ's
15 duty to investigate does not extend to a duty to generate evidence
16 of a disability that is not clearly indicated on the record.
17 Turner v. Califano, 563 F.2d 669, 671 (5th Cir. 1977); Nisenbaum v.
18 Callahan, 1999 WL 92650 (N.D. Cal.).

19 The relevant portion of this Court's remand order reads: "If
20 necessary/warranted, the ALJ will obtain medical expert and
21 supplemental vocational expert evidence." AR 717. The Appeals
22 Council provided further instructions to the ALJ to obtain
23 additional evidence about Plaintiff's mental impairment, including
24 a "consultive mental status examination with psychological
25 testing," but only "if warranted and available." AR 721.

26 The Court's remand order did not compel Defendant to generate
27 an additional medical report. It merely stated that, if necessary
28

1 or warranted, the ALJ would obtain an evaluation of Plaintiff's
2 mental status. Plaintiff misconstrues this language. Further, the
3 Appeals Council's instructions were in accord with the remand
4 order.

5 The ALJ supplemented the record by obtaining further
6 information from Plaintiff, both prior to and at the hearing and
7 considered these additional medical records and reports in her 2005
8 determination. The ALJ discussed the updated records from
9 Plaintiff's treating physician, Dr. Ellis; a March 30, 2004
10 Neurological Consultive Examination by Dr. Tran; treatment records
11 from Plaintiff's marriage and family therapist, Ms. Britton; and
12 reports from Dr. Feinberg, who examined Plaintiff in both 2000 and
13 2001. AR 703. Dr. Feinberg's treatment notes explained that an
14 evaluating psychologist, Dr. Charles Casella, examined Plaintiff on
15 September 19, 2000, and ruled out mental impairment. AR 614, 703.
16 The ALJ requested an existing psychological evaluation, conducted
17 in connection with Plaintiff's Workers' Compensation claim, but
18 Plaintiff's attorney never submitted the report. AR 936-937. The
19 ALJ made reasonable attempts to obtain the report. The ALJ
20 complied with the Court's remand order, which instructed the ALJ to
21 "obtain medical expert and supplemental vocational expert
22 evidence," as necessary, by utilizing both a vocational expert and
23 a medical expert during the October, 2004 hearing. AR 717.

24 Plaintiff did not claim a mental disability on either of her
25 applications for disability; on June 3, 1999, she claimed thoracic
26 outlet syndrome and chronic pain, and on November 15, 2002, she
27 claimed degenerative disc disease and nerve damage. AR 122, 786.

1 Also, both Plaintiff and her attorney failed to submit valid
2 evidence in support of a possible mental impairment component to
3 her disability claim. AR 724, 936-937.

4 It was not the ALJ's duty to generate additional evidence of
5 mental impairment where the record did not establish a medical
6 basis for this claim during the relevant time period, and where a
7 psychological evaluation reportedly found no mental impairment.
8 Accordingly, the Court finds that the ALJ complied with the remand
9 order.

10 III. The ALJ Did Not Err in the Step Five Determination

11 Plaintiff contends that the ALJ's step five finding, that
12 Plaintiff was capable of performing work that exists in the
13 national and local economy, was not supported by substantial
14 evidence. Plaintiff argues first that the ALJ erred by
15 misconstruing reports that included limitations that would preclude
16 Plaintiff from performing two of the three occupations cited by the
17 ALJ in her step-five analysis. Second, Plaintiff asserts that the
18 ALJ did not sufficiently explain the weight she assigned to the
19 reports of Dr. Tran and Dr. Feinberg. Plaintiff's third contention
20 is that the testimony of the VE conflicted with the Dictionary of
21 Occupational Titles (DOT).

22 In step five, the ALJ must demonstrate "that other work exists
23 in significant numbers in the national economy" that the claimant
24 can do, given his or her RFC, age, education and past work
25 experience. 20 C.F.R. § 404.1560(c)(2); Smolen v. Chater, 80 F.3d
26 1273, 1291 (9th Cir. 1996). A claimant's RFC is the most he or she
27 "can still do despite his [or her] limitations," or the claimant's

maximum ability to perform sustained work in an ordinary work setting on a regular and continuing basis, eight hours a day for five days a week. 20 C.F.R. § 404.1545(a)(1). The ALJ weighs all of the relevant medical and other evidence to make the RFC determination. 20 C.F.R. § 404.1545(a)(3). Then, the ALJ compares the claimant's RFC and the nature of the impairments to a table of medical vocational guidelines to determine the claimant's ability to perform any gainful work in the national economy. 20 C.F.R. § 404.1520(g); Cooper v. Sullivan, 880 F.2d 1152, 1155 (9th Cir. 1989). "When [the vocational guidelines] do not adequately take into account claimant's abilities and limitations, [they] are to be used only as a framework, and a vocational expert must be consulted" to determine whether substantial gainful work exists for the claimant. Thomas v. Barnhart, 278 F.3d 947, 960 (9th Cir. 2002). Hypothetical questions posed by the ALJ to the VE must set out all of the claimant's limitations and restrictions. Light v. Soc. Sec. Admin., 119 F.3d 789, 793 (9th Cir. 1997). The assumptions in the hypothetical must be supported by the record. Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988).

A. The ALJ Did Not Err in Her RFC Determination

First, Plaintiff argues that the ALJ's determination that Plaintiff retained the RFC occasionally to reach with her right arm was not consistent with the evidence cited in her decision, specifically the medical reports from Drs. Feinberg and Tran. The ALJ determined that Plaintiff retained the RFC to lift ten pounds occasionally; stand and walk two hours out of an eight hour day; sit for six hours out of an eight hour day; and occasionally climb,

1 stoop and reach with her right arm. AR 708. The ALJ explained
2 that her RFC assessment was based on Dr. Feinberg's opinion that
3 Plaintiff could not perform work with her right arm above shoulder
4 level or repetitively reach with the right arm, and should avoid
5 heavy lifting; Dr. Tran's finding that Plaintiff could only
6 occasionally climb, stoop and reach above her head with her right
7 arm; and Dr. Zwerling's assessment that Plaintiff would require an
8 option to sit or stand. Id.

9 The ALJ based her assessment of Plaintiff's RFC on substantial
10 evidence in the record. In his January, 2001 report, Dr. Feinberg
11 noted that Plaintiff could not perform work above shoulder level
12 with her right arm, and would be precluded from forceful or
13 repetitive work or heavy lifting with that arm. AR 616. He
14 explained that, although using her right arm caused her discomfort,
15 Plaintiff actually had a full range of motion. Id. at 615. Dr.
16 Tran found that Plaintiff could lift twenty pounds occasionally and
17 less than ten pounds frequently; only occasionally climb, stoop or
18 reach above her head; and never crawl. AR 889-93. Dr. Zwerling
19 determined that Plaintiff was not impaired in terms of standing,
20 sitting or walking, but that she would need frequent alterations of
21 position, and could not lift or carry more than ten pounds at a
22 time. AR 366. At Plaintiff's 2004 hearing, the medical expert
23 testified that these opinions were consistent with the medical
24 record. AR 937. Thus, the ALJ's determination that the reports
25 from Drs. Feinberg and Tran supported a conclusion that Plaintiff
26 could occasionally reach with her right arm was both reasonable and
27 consistent with the record.

1 B. The ALJ Properly Assigned and Explained the Weight She
2 Applied to the Evidence

3 Second, Plaintiff argues that the ALJ did not sufficiently
4 explain the weight that she assigned to the reports of Drs.
5 Feinberg and Tran. Although Plaintiff does not dispute the ALJ's
6 reliance on these reports or the weight assigned to other evidence,
7 she contends that the ALJ used obscure language in assigning
8 weight.

9 Because of Plaintiff's amended onset date, the ALJ explained
10 that she gave greater weight to the more recent opinions. AR 708.
11 The ALJ gave primary weight to the opinion of Dr. Feinberg, who
12 examined Plaintiff at least twice between 2000 and 2001. AR 707.
13 The ALJ found that Dr. Feinberg's 2001 medical assessment was
14 consistent with the medical record as a whole. The ALJ also
15 assigned some weight to the opinion of Dr. Tran, who provided the
16 most recent assessment of Plaintiff's RFC, and found that it was
17 consistent with Dr. Feinberg's assessment. AR 708. Lastly, the
18 ALJ took into account the statement of Dr. Bertoldi, the medical
19 expert who testified at the hearing, that he agreed with the
20 limitations set forth by Dr. Tran. AR 947-49.

21 Along with reports from Dr. Feinberg and Dr. Tran, the ALJ
22 also discussed and assigned weight to other evidence in the record.
23 The ALJ explained that she gave little weight to Dr. Zwerling's
24 opinion, that Plaintiff had no sitting, standing or walking
25 impairment, because he saw Plaintiff only on a few occasions before
26 February, 1999. AR 705-06. However, the ALJ factored Dr.
27 Zwerling's assessment that Plaintiff required an option to sit or

1 stand into the RFC assessment. The ALJ also considered Dr. Ellis's
2 opinion that Plaintiff was precluded from work activity, but found
3 that it was neither reliable nor credible in light of the numerous
4 examining physicians who had disagreed with his diagnosis and
5 treatment methods. AR 706-07. The ALJ also considered the opinion
6 of Mr. Rosen, Plaintiff's treating physical therapist, that
7 Plaintiff was precluded from work activity. AR 707. However, the
8 ALJ explained that because Mr. Rosen was neither an acceptable
9 medical source nor a vocational expert, his opinion was not given
10 weight. Id.

11 Accordingly, the ALJ provided clear, specific and legitimate
12 reasons for the weight she assigned to each opinion, specifically
13 those of Drs. Feinberg and Tran.

14 C. The ALJ Properly Relied on the VE's Testimony in Making
15 the Step Five Non-Disability Determination

16 Plaintiff's third assertion is that the ALJ's step five
17 determination was flawed because the ALJ's hypothetical questions
18 to the VE did not include a limitation on reaching, and that the
19 VE's resulting testimony conflicted with the occupations listed in
20 the DOT.

21 In her decision, the ALJ explained that she utilized the
22 testimony of the VE, within the framework of the Medical-Vocational
23 Guidelines, to determine that there were sedentary jobs existing in
24 significant numbers in the national economy that Plaintiff could
25 still perform, given her age, education, professional skills and
26 RFC. AR 709. The ALJ determined that Plaintiff was capable of
27 "sedentary work" as defined in 20 C.F.R. § 404.1567, which

1 "involves lifting no more than ten pounds at a time and
2 occasionally lifting or carrying articles like docket files,
3 ledgers, and small tools." AR 709; 20 C.F.R. § 404.1567(a). The
4 ALJ also concluded that Plaintiff had no limitation in using her
5 left arm, but she had some functional limitation in her right arm
6 and would require an option to sit or stand. AR 708.

7 The ALJ posed hypothetical questions to the VE that accounted
8 for all of Plaintiff's functional limitations. The ALJ drew
9 directly from the medical evidence in formulating her questions,
10 specifically Dr. Feinberg's assessment that Plaintiff was precluded
11 from work above shoulder level with the right arm, should avoid
12 heavy lifting and could not perform repetitive functions with the
13 right arm; and Dr. Tran's opinion that Plaintiff could only
14 occasionally reach in all directions, including overhead. The
15 ALJ's second question depicted a person who would only occasionally
16 be able to lift ten pounds or reach with the right arm. AR 979-80.
17 Therefore, Plaintiff's argument is unavailing. The ALJ's
18 hypothetical questions to the VE appropriately accounted for
19 Plaintiff's limitation on the use of her right arm, as well as
20 other limitations.

21 Plaintiff contends that the VE's answer to the ALJ's
22 hypothetical questions included two occupations, collections clerk
23 and credit authorizer, that require "frequent" reaching. First,
24 Plaintiff argues that the VE contradicted the DOT regarding the
25 "occasional" reaching requirement of the collections clerk
26 occupation. However, according to the DOT, the collections clerk
27 occupation requires only occasional reaching one-third of the time.

1 DOT (2001) (241.357-010 Collection Clerk).

2 Second, Plaintiff disputes the ALJ's reliance on the VE's
3 testimony regarding the occupation of credit authorizer. The DOT
4 indicates that this occupation may require frequent reaching one-
5 third to two-thirds of the time. DOT (249.367-022 Credit
6 Authorizer). However, as Defendant points out, this does not mean
7 frequent reaching with both arms. The purpose underlying the use
8 of a VE is to assess variables that are not encompassed by the DOT.
9 Barring an erroneous assessment of the occupation, determining
10 whether this particular occupation requires reaching with one or
11 both extremities is presumably the province of the VE. Also, even
12 excluding this one occupation, the remaining two occupations,
13 telemarketer and collections clerk, account for 1,236,900 jobs in
14 the national economy and 18,500 jobs in the local economy, which is
15 sufficient to establish the availability of a "significant number"
16 of jobs which Plaintiff can perform, given her limitations. See
17 Barker v. Sec. of Health & Human Servs., 882 F.2d 1474, 1479 (9th
18 Cir. 1989) (finding that 1,266 local jobs constituted "significant
19 numbers"); AR 980.

20 For the reasons described above, the Court finds that the
21 ALJ's step five determination, that Plaintiff was capable of
22 performing work that existed in the national economy, was properly
23 supported by substantial medical evidence and the VE's testimony.

24 IV. The ALJ Properly Considered Plaintiff's Alleged Medication
25 Side Effects and Self-Reported Activity Limitations

26 Plaintiff argues that the ALJ misconstrued Plaintiff's self-
27 reported activities of daily living and failed to consider the side

1 effects from her medication in determining that she could perform
2 sedentary work. Both of these contentions are related to the ALJ's
3 assessment that Plaintiff was not credible and that her statements
4 were inconsistent with the other evidence in the record. AR 705.

5 An individual's symptoms will be determined to diminish his or
6 her capacity for basic work activities to the extent that the
7 symptoms are reasonably consistent with the medical and other
8 evidence, including the individual's daily activities, type and
9 effects of any pain medication, and treatment and other measures
10 used to relieve pain. 20 C.F.R. § 404.1529(a),(c)(3). When
11 assessing a claimant's subjective statements about symptoms and
12 their functional effects, the "ALJ must make a finding as to the
13 credibility of the claimant's statements." Robbins v. Social Sec.
14 Admin., 466 F.3d 880, 883 (9th Cir. 2006). A claimant's subjective
15 statement regarding a symptom must be supported by objective
16 medical evidence, generated by medically acceptable techniques, of
17 an underlying impairment, "which could reasonably be expected to
18 produce the . . . symptoms alleged." 42 U.S.C. § 423(d)(5)(A);
19 Cotton v. Bowen, 799 F.2d 1403, 1407-08 (9th Cir. 1986).

20 Conversely, an ALJ may not disregard a claimant's subjective
21 testimony about excess pain, "solely on the ground that it is not
22 fully corroborated by objective medical findings." Cotton, 799
23 F.2d at 1407; Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989).
24 "Unless there is affirmative evidence showing that the claimant is
25 malingering, the Commissioner's reasons for rejecting the
26 claimant's testimony must be 'clear and convincing.'" Lester v.
27 Chater, 81 F.3d 821, 834 (9th Cir. 1995) (quoting Swenson v.

1 Sullivan, 876 F.2d 683, 687 (9th Cir. 1989)). This means that "the
2 ALJ must identify what testimony is not credible and what evidence
3 undermines the claimant's complaints." Id.

4 In Plaintiff's case, the ALJ identified several specific
5 instances in which Plaintiff's testimony was undermined by other
6 evidence in the record. The ALJ cited evidence to illustrate that
7 Plaintiff's claims of frequent debilitating headaches were not
8 consistent with her medical record. AR 704. In 2000, Plaintiff
9 told evaluating physical therapist Peter Edgelow that, a year after
10 her injury, her headaches had stopped and she had been relatively
11 stable for the previous two years with the use of medication. AR
12 624. In 1997, Plaintiff reported that she was doing much better
13 than the year prior. AR 255. Plaintiff's claim of complete
14 disability was also inconsistent with her testimony that she was
15 found only thirty-three and one-third percent disabled by Workers'
16 Compensation. AR 965-66. Lastly, Dr. Adornato, who physically
17 examined Plaintiff and viewed surveillance videotapes, noted
18 inconsistencies between Plaintiff's presentation on examination and
19 her daily functioning on the videotape. AR 314. For the foregoing
20 reasons, the ALJ provided clear and convincing reasons for
21 disputing Plaintiff's credibility.

22 The ALJ also provided a reasonable rationale for finding that
23 Plaintiff's specific claim of "fuzzy headedness" was not entirely
24 credible in light of her self-reported daily activities and the
25 medical record. AR 704. The ALJ cited Plaintiff's testimony that
26 she engaged in a wide range of daily activities that included
27 walking an hour each day, grocery shopping once a week,

1 vacationing, watching movies, doing some laundry, and using the
2 computer for ten to fifteen minutes a day. AR 704. Plaintiff's
3 spouse, Mr. Coldiron, reported that Plaintiff walked, shopped, took
4 care of financial matters, did some light cooking, read, and drove
5 their children places. AR 144, 705. As discussed above, the ALJ
6 noted that Plaintiff's medical records contained no evidence of
7 functional limitations caused by mental impairment. AR 703. Thus,
8 the ALJ provided clear and convincing reasons for giving little
9 weight to Plaintiff's subjective complaint of "fuzzy headedness."

10 Plaintiff cites Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.
11 1989), for the proposition that a person need not be "utterly
12 incapacitated" to be found disabled. But, where a plaintiff
13 claiming disability is able to spend a substantial part of his or
14 her day performing physical functions that are transferable to a
15 work setting, an ALJ may properly discredit his or her allegations
16 of complete inability to work. Morgan v. Comm'r of Soc. Sec.
17 Admin., 169 F.3d 595, 600 (9th Cir. 1999). Further, if despite her
18 claims of pain, a plaintiff "is able to perform household chores
19 and other activities that involve many of the same physical tasks
20 as a particular type of job, it would not be farfetched for an ALJ
21 to conclude that [his or her] pain does not prevent [him or her]
22 from working." Fair, 885 F.2d at 603.

23 Although Plaintiff argues that the ALJ misconstrued her
24 lifestyle as "active," the ALJ provided convincing reasons for
25 determining that Plaintiff could perform sedentary activities. AR
26 705. The ALJ cited Plaintiff's direct testimony and Mr. Coldiron's
27 statements about Plaintiff's lifestyle, as well the medical record

1 describing Plaintiff's specific functional limitations. AR 704-05.
2 The ALJ's determination that Plaintiff's activities of daily living
3 could be sufficiently applied to sedentary work activity was both
4 reasonable and consistent with the record.

5 Because the ALJ provided clear and convincing reasons for
6 finding that Plaintiff could perform jobs existing in significant
7 numbers in the national economy, Defendant did not err.

8 CONCLUSION

9 Because the ALJ properly applied the five-step analysis to
10 conclude that Plaintiff was not disabled, and for the more specific
11 reasons outlined above, Defendant did not commit reversible error.
12 The Court finds that the ALJ's decision that Plaintiff is not
13 disabled within the meaning of the SSA was supported by substantial
14 evidence in the record and was based upon proper legal standards.
15 Accordingly, Plaintiff's motion for summary judgment is DENIED and
16 Defendant's motion for summary judgment is GRANTED. The Clerk
17 shall enter judgment accordingly and close the file. Each party
18 shall bear his or her own costs.

19 IT IS SO ORDERED.

20 Dated: 3/28/08

21 CLAUDIA WILKEN
United States District Judge

